IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARCIA FAIRBROOK, Appellant, v. METROPOLITAN KING COUNTY, a Washington municipal corporation, Respondent.	)	No. 56627-0-I DIVISION ONE UNPUBLISHED FILED: August 14, 2006

COX, J. – The dispositive issue in this personal injury action is whether substantial evidence supports the jury's special verdict that King County (Metro) was not negligent. Our review of the record convinces us that there is substantial evidence to support the verdict. Moreover, the giving of the challenged instruction does not require reversal. We affirm.

Marcia Fairbrook was turning right off Bothell Way when a Metro bus struck her car from behind. She had just left the "transit only" lane and had begun to enter a parking lot when the bus hit her car. Though the impact was slight and damage to the car minimal, Fairbrook sustained significant injuries due to previously diagnosed juvenile rheumatoid arthritis.

Fairbrook sued Metro, claiming the bus driver's negligence caused the accident. The case was tried to a jury, which returned a special verdict finding Metro was not negligent.

Fairbrook appeals.

New Trial

Fairbrook first assigns error to the trial court's denial of her motion for new trial, which this court reviews for abuse of discretion.[1] A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds or reasons.[2] We hold there was no abuse of discretion in denying her motion.

Fairbrook contends she was entitled to a new trial under CR 59(a)(7) because there was insufficient evidence to support the jury's finding that the Metro driver was not negligent. Absent legal error, a jury verdict can be overturned only when it is manifestly unsupported by substantial evidence.[3] Evidence must be considered and all inferences drawn in favor of the non-moving party.[4] Moreover, credibility determinations and the weight given to evidence are matters for the jury.[5] A reviewing court may not substitute its judgment for that of the jury so long as there is evidence which, if believed, would support the verdict.[6]

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[1] Lian v. Stalick, 106 Wn. App. 811, 823-24, 25 P.3d 467 (2001).

[2] Id. at 824.

[3] Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003); Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994).

[4] Ketchum v. Wood, 73 Wn.2d 335, 336, 438 P.2d 596 (1968).

[5] Morse, 149 Wn.2d at 574; Burnside, 123 Wn.2d at 108.

[6] Burnside, 123 Wn.2d at 108.

For example, in Morse v. Antonellis, the supreme court reinstated a jury's defense verdict where the dispositive question was whether the defendant had exercised due care in turning left despite a duty to yield to oncoming traffic. Because there was conflicting testimony about the events immediately preceding the collision, the court commented: "In order to determine whether [the defendant] acted reasonably, the jury simply had to decide who to believe…. [W]hether a reasonable person would have seen [plaintiff] approaching largely depends on whose version of the accident is most credible. Juries decide credibility, not appellate courts."[7]

Fairbrook raises two challenges, neither of which persuasively establishes that there is insufficient evidence to support the jury's finding that the Metro driver was not negligent. Fairbrook first contends that the evidence, even considered in Metro's favor, unmistakably shows the Metro driver was negligent. She points to the bus driver's "erroneous assumption" that Fairbrook planned to turn at a distant intersection rather than the upcoming driveway, failure to anticipate Fairbrook's dramatic decrease in speed to negotiate the turn, and failure to swerve to the left to avoid the collision.

Although these were matters that Fairbrook was entitled to argue to the jury, they do not compel the conclusion that the driver was negligent. There was also ample evidence from which the jury could conclude the driver acted reasonably under the circumstances and thus was not negligent. This evidence

[7] Morse, 149 Wn.2d at 574-75.

included that Fairbrook did not see the bus when she made the lane change into the transit lane in front of the bus, that she entered the transit lane with only one to two cars' lengths' distance between her car and the bus, less than half the preferred safe following distance for a bus, that Fairbrook's car stopped midway through her turn into the driveway from the transit lane, and that the contour of the road prevented the bus driver from seeing whether she could safely swerve left to avoid the collision with Fairbrook's car. This is substantial evidence that a jury could believe to decide that the driver was not negligent.

Second, Fairbrook contends that under the "following driver rule" there is no evidence to support the "emergency" exception that could rebut the bus driver's prima facie negligence. The "following driver" rule provides that where the driver of a vehicle is following another vehicle, the primary duty of avoiding a collision rests upon the following driver, and thus a rear-end collision is prima facie evidence of the following driver's negligence.[8] But though the following driver has the primary duty of avoiding an accident, she is not necessarily guilty of negligence as a matter of law simply because she collides with the vehicle in front of her.[9]

The following driver's duty is only to allow for such actions by the leading vehicle and surrounding traffic as should be anticipated under the

[8] Vanderhoff v. Fitzgerald, 72 Wn.2d 103, 106, 431 P.2d 969 (1967); Riojas v. Grant County PUD, 117 Wn. App. 694, 701, 72 P.3d 1093 (2003), review denied, 151 Wn.2d 1006 (2004).

[9] Vanderhoff, 72 Wn.2d at 105.

circumstances.[10] Thus, though a rear-end collision is prima facie evidence of the following driver's negligence, that prima facie showing is overcome by evidence that some emergency or unusual condition not caused or contributed to by the following driver caused the collision, which makes the liability of the following driver a jury question.[11]

Here, despite Fairbrook's argument to the contrary, there was evidence supporting a finding that circumstances immediately preceding the collision constituted an emergency or unusual situation and were not the product of the Metro driver's negligence. The evidence of Fairbrook's lane change close to the oncoming bus, followed by rapid deceleration and turning, compounded by the fact that the bus driver lacked time and visibility to determine whether a swerve to the left could be completed safely, all could support a finding that the bus driver faced an emergency situation beyond what she had a duty to anticipate.

In short, this case, like Morse, turned primarily on the credibility of the

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[10] Ryan v. Westgard, 12 Wn. App. 500, 506, 530 P.2d 687 (1975).

[11] Riojas, 117 Wn. App. at 701; Vanderhoff, 72 Wn.2d at 106 (negligence is a jury question where evidence road was extremely slippery could support finding an unusual condition prevented following driver from stopping safely); see Ryan, 12 Wn. App. 500 (negligence a jury question where evidence could support finding that following driver had no duty to anticipate leading driver's sudden decrease in speed); cf. Ray v. Cyr, 17 Wn. App. 825, 829, 565 P.2d 817 (1977) (following driver negligent as matter of law where evidence undisputed that following driver caused accident by failing to respond to leading car's stop, though she had been following at speed and distance affording time to stop had she responded); Schlect v. Sorenson, 13 Wn. App. 155, 158, 533 P.2d 1404 (1975) (following driver negligent as matter of law where observed but did not respond to signals of approaching danger, and where no evidence of emergency).

witnesses, as viewed by the jury. The evidence could have supported a verdict for either party. The jury considered the evidence, found the bus driver's testimony credible, and concluded that the Metro driver acted reasonably. There was no negligence on the part of the driver.

The parties' dispute about whether a following driver can ever be prima facie negligent under current law does not alter our analysis. Violation of the statute which imposes the following driver's duty no longer constitutes negligence per se, but may only be considered as evidence of negligence.[12] However, the following driver's common law duty to avoid collisions remains such that the fact of a rear-end collision does constitute a prima facie case of negligence.[13]

We do not address Fairbrook's assertion that she was entitled to a new trial under CR 59(9), because she merely cites that rule without argument.[14]

Jury Instructions

Fairbrook next assigns error to jury instruction 20, and contends that the erroneous instruction is a basis for new trial under CR 59(a)(8). She argues that the instruction, though legally correct, is misleading. Because the court did not abuse its discretion in giving the instruction, we disagree.

On review of a challenge to jury instructions, the inquiry is whether the trial court abused its discretion by giving or refusing to give a particular

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[12] Morse, 149 Wn.2d at 574.

[13] Vanderhoff, 72 Wn.2d at 105-06; Riojas, 117 Wn. App. at 701.

[14] See RAP 10.3(a)(5); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

instruction.[15] Jury instructions are read as a whole.[16] A jury is presumed to follow the court's instructions.[17] Speculation that a jury did not follow the instructions does not support the grant of a new trial.[18] We may affirm on any ground supported by the record.[19]

Challenged Instruction 20 reads:

> A statute provides that no person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided. ***A signal of intention to turn or move right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning.*** No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.[20]

Instruction 20 arguably relates to Instruction 18, which states that "[t]he violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence."

Fairbrook does not argue that Instruction 20 or any part of it is an incorrect statement of the law. The specific sentence to which she objects

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[15] Goodman v. Boeing Co., 75 Wn. App. 60, 68, 877 P.2d 703 (1994), aff'd, 127 Wn.2d 401, 899 P.2d 1265 (1995).

[16] State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004).

[17] Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 136, 875 P.2d 621 (1994).

[18] Crane & Crane, Inc. v. C & D Electric, Inc., 37 Wn. App. 560, 570, 683 P.2d 1103 (1984).

[19] Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 282, 96 P.3d 386 (2004).

[20] Clerk's Papers at 418 (emphasis added).

accurately states the law.[21] She essentially argues that the instruction permitted the jury to determine that she was 100 percent negligent because of evidence that she moved into the transit lane without signaling, on which basis the jury could conclude the bus driver was relieved of responsibility for the collision following Fairbrook's failure to signal.[22]

We reject this argument as unwarranted speculation. The jury's special verdict form read: "Question No. 1: Was the defendant negligent? Answer: No." The verdict form went on to state: "If you answered "no" to Question No. 1, sign and return this verdict form." In this case, the jury answered "no," the presiding juror signed the form, and returned it. We note that the question of Fairbrook's negligence does not appear on the verdict form until Question No. 4, which states: "Was the plaintiff negligent?" The answer to that question is blank, in accordance with the court's instruction to the jury to sign and return the form if it answered "no" to the first question. In short, to argue that the jurors considered Fairbrook's negligence, thus negating Metro's negligence, would require us to believe that the jury failed to follow the court's instruction. The verdict form supports the contrary conclusion. That the jury never reached the question of Fairbrook's negligence is evident from the verdict form and the presumption we

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[21] RCW 46.61.305 provides in relevant part:
(1) No person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.
(2) A signal of intention to turn or move right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning.

[22] Id.

must apply that the jury followed the court's instructions. Reading the instructions as a whole, this legally correct instruction was not misleading. There is no basis to reverse the jury's special verdict.

Moreover, we think any error in giving Instruction 20 was harmless. This case presents facts similar to those in Bertsch v. Brewer, where the supreme court declined to rule on an alleged instructional error where the parties disputed whether there was any evidence of the plaintiff's contributory negligence in the record:

> This evidence, however, is related to the issue of damages rather than liability. The jury found no negligence on [defendant's] part and, therefore, never reached the issue of [plaintiff's] contributory negligence…. Because the jury found no negligence…they presumably never reached the issue of…contributory negligence. The error, if any, was harmless.[23]

As evidenced by the special verdict form, the jury here disposed of the case on a question of the bus driver's liability without reaching the question of whether a portion of damages were attributable to Fairbrook's negligence. Fairbrook's argument that the jury necessarily considered Fairbrook's negligence in determining Metro's liability because "someone had to have fault for the incident" again ignores the instructions to the jury implicit in the special verdict form and improperly speculates on the jury's internal processes.[24]

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[23] 97 Wn.2d 83, 92, 640 P.2d 711 (1982).

[24] See State v. Linton, 156 Wn.2d 777, 787, 132 P.3d 127 (2006) (citing Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 204, 75 P.3d 944 (2003) (neither parties nor judges may inquire into the internal processes through which the jury reaches its verdict)).

We affirm the judgment.

Cox, J.

WE CONCUR:

Schindler, ACJ

Grosse, J.